

# **FIDUCIARY ADVISORY COMMISSION**

## **2004 ANNUAL REPORT**

**June 2004**

## BACKGROUND

The Fiduciary Certification Program was first established by the Arizona Legislature in 1994, in response to some highly publicized and unfortunate cases of mismanagement and financial exploitation of incapacitated and protected persons by a prominent Maricopa County fiduciary and his attorney. Arizona Revised Statutes § 14-5651 states the Superior Court shall not appoint a fiduciary unless the individual is certified by the Supreme Court.

A "fiduciary", for purposes of A.R.S. § 14-5651 is defined by statute as: (1) an individual who is appointed by the court as a guardian or conservator for a person unrelated to the fiduciary and who charges a fee for this service, or (2) a person appointed by the court as a personal representative who is not related to the decedent, receives a fee and is not nominated in a will or by a power conferred in a will and is not a devisee in the will.

This statutory definition thereby incorporates public, non-profit and private sector individual or business fiduciaries and the requirement regarding certification applies to all of these entities. Due to funding limitations, the Fiduciary Program was not fully implemented until 1999 after applicants for certification had completed initial training and passed the examination.

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There are currently ~~300~~ certified fiduciaries across the state. This number represents individuals and business in private practice, some non-profits and public fiduciaries. The certification of fiduciaries is governed by the Arizona Code of Judicial Administration § 7-201 and § 7-202, which are commonly referred to as ACJA, the "administrative code," or "administrative rules."

Although the majority of certified fiduciaries perform their duties in a competent and ethical manner, unfortunately, financial exploitation and mismanagement by some fiduciaries has occurred since implementation of the program, requiring extensive staff time to investigate and take appropriate disciplinary action. For example, investigations have resulted in revocation of the certificates of fiduciaries in both the public and private sectors. In some cases, emergency suspensions have been necessary to protect the public health and welfare. When appropriate, referrals have been made to the county attorney and Attorney General and criminal prosecutions have been initiated. In some cases, the prosecutions resulted in lengthy prison terms for fiduciaries who have stolen millions of dollars from their clients.

The above events highlighted concerns as to whether the methods and resources used by the judicial system to monitor fiduciary accountings and cases adequately protect the public. In response to a March 2000 presentation by Judge Donald Daughton, then Presiding Probate Judge of the Superior Court in Maricopa County, the Arizona Judicial Council (AJC), recommended Chief Justice Zlaket appoint a committee to further examine this situation. Justice Zlaket subsequently appointed and directed the Fiduciary Advisory Committee ("FAC") to examine the current procedures for appropriate oversight of fiduciary accountings and case management and

to recommend any needed changes to administrative procedures, rules and statutes, with identification of the budgetary impact of such recommendations.

The Fiduciary Advisory Committee presented a preliminary report to AJC in October 2000 and a final report in June 2001. The final report addressed issues concerning the Fiduciary Certification Program, training and audits of fiduciaries, standardization of procedures, court appointed-counsel and relevant statutes. The report provided a total of twenty-six substantive recommendations to address identified concerns. With the exception of modification to one of the recommendations, the AJC and the Court adopted all of the recommendations.

One of the key recommendations of the 2001 report was to establish an ongoing Fiduciary Commission to serve in an advisory capacity on fiduciary matters to the AJC and the Supreme Court. Subsequently, in August 2002, Chief Justice Jones established the Fiduciary Advisory Commission, with statewide representation from the judicial and executive branches, fiduciary and legal professions and the public. Administrative Order No. 2002-92 establishing the Commission is contained in Appendix A; the current membership of the Commission is listed in Appendix B.

The Commission provides this June 2004 report to the AJC in accordance with Administrative Order No. 2002-92. This report gives an update on the actions of the Commission and the Fiduciary Certification Program regarding each of the adopted recommendations of the 2001 report and provides new recommendations by the Commission regarding fiduciary issues.

## **DISCUSSION OF ISSUES AND RECOMMENDATIONS**

### **I. FIDUCIARY CERTIFICATION PROGRAM**

The 2001 report discussed the implications of certification, especially in light of the role of the Superior Court appointing a fiduciary and other professionals and whether or not the Fiduciary Program should be moved to the executive branch. The report considered National Probate Court Standard 3.1.2 Fiduciaries, which states:

*(a) The probate court should appoint as fiduciaries only those persons who are (1) competent to serve, (2) aware of and understand the duties of the office, and (3) capable of performing adequately. A fiduciary nominated by a decedent should be appointed by the court absent disqualifying circumstances.*

The 2001 report included seven recommendations regarding the program, initial qualifications for examination and certification as a fiduciary, staff review of the initial applications and training of fiduciaries as follows:

1. **The fiduciary certification program should be retained and remain under the administration of the Arizona Supreme Court, AOC.**

*Status: AJC adopted this recommendation in June 2001 and therefore, no further action was necessary.*

2. **Amend the application forms for initial and renewal certification to require applicants to disclose information regarding financial stability and if they have been subject to a contempt of court order. The program coordinator could conduct a credit check if the application contained any of the "red flag" indicators, including financial instability or contempt of court. In addition, the coordinator could conduct a credit check upon the request of a judicial officer or during an investigation into a complaint.**

*Status: This recommendation is 100% complete. The initial certification and renewal applications were amended to provide the recommended information. The Fiduciary Certification Program continually updates applications for initial and renewal training sessions to remain in compliance with changes to statutes and the Arizona Code of Judicial Administration. Credit checks are conducted as deemed necessary.*

3. **Review and modify the initial training program. Amend the administrative rules governing the program to raise the number of hours to 18 from the current 12 hours; develop and include a session on successful business practices, minimum policies and procedures for fiduciary offices and provide additional information on the role and responsibilities of fiduciaries. It is suggested the increased number of training hours would take effect with the initial training session planned for April 2002.**

*Status: Changes were enacted to ACJA § 7-202 to increase the training hours and address the suggested issues.*

4. **Amend the administrative rules to require one year of fiduciary experience for applicants with a four-year college degree and three years of fiduciary experience for applicants with a high school or GED education.**

*Status: This recommendation was completed via adoption of changes to ACJA § 7-202 in 2003.*

5. **Increase the number of continuing education required for renewal of certification from six to twenty hours.**

*Status: This recommendation was completed via adoption of changes to ACJA § 7-202 in 2003.*

6. **Permit training provided by entities other than the AOC to qualify for some of the renewal training requirements. Some of the required credits would be met through the training session offered by the AOC with the remaining hours from other professional organizations such as the State Bar of Arizona, National Probate College, National**

**Academy of Elder Law Attorneys, National Guardianship Association, Arizona Fiduciary Association, etc.**

*Status: This recommendation was completed via adoption of changes to ACJA § 7-202. Effective June 1, 2004, the Fiduciary Certification Program will no longer provide the initial or renewal training. Applicants for initial certification will now qualify for certification through their educational and experience backgrounds and by passing the initial examination. The Program will provide a session, post-examination, on the role and responsibilities of the certified fiduciary.*

**7. Encourage networking among fiduciaries.**

*Status: This recommendation is ongoing in the fiduciary community, through the Arizona Fiduciary Association and the efforts of the Fiduciary Commission and Program staff. However, the Commission recognizes that while networking among fiduciaries is worthwhile, this recommendation is an immeasurable goal.*

**II. TRAINING**

The 2001 Report contained three recommendations regarding the issue of training for judicial officers and staff.

**8. Require all judicial officers and court staff regularly assigned probate matters to attend specialized training on probate issues.**

*Status: Special sessions for judicial officers were developed and presented in 2001 and 2003. This effort continues through the work of the Education Services Division of the AOC and Fiduciary Program staff. For example, the New Judge Orientation Program contains a session on probate issues and educational sessions are available to probate judicial officers and staff as requested. The Commission notes this goal, as presented, is difficult to measure.*

**9. In cooperation with the Judicial College, provide a session on probate issues at New Judge Orientation, the June 2001 judicial conference and at subsequent judicial conferences.**

*Status: A session on probate issues was offered at the June 2001 and June 2003 judicial conferences and probate training for new judges is ongoing.*

**10. Encourage judicial officers handling probate cases to participate in county and state bar activities, sections and continuing education seminars relating to probate, mental health and elder law.**

*Status: Seminars have been offered and are ongoing by the Arizona Fiduciary Association, State Bar, National Association of Elder Law Attorneys, National Guardianship Association and other providers.*

### III. INFORMATION AND TECHNOLOGY

A major issue identified by the 2001 report was the various data systems utilized throughout the Superior Court, their limitations, and the inconsistencies in the type of information collected and coded. The unique aspects of the Probate Court emphasize the need for automated tools that will allow judicial officers and staff to perform oversight of cases. Probate is not a typical adversarial setting and review of a case can be dependent upon a fiduciary filing an action, for example, the annual guardianship report. Without adequate automated tools, a case may not receive court oversight when, for example, a fiduciary does not file an annual report, or a response required pursuant to a court order. Systems are needed to ensure oversight of the cases is not dependent upon the action of a fiduciary or another interested party.

The FAC identified a specialized module of the FACTS case management software developed for the management of probate cases. This module provides the Probate Court with some of the tools the Court needs to perform its oversight responsibilities, including, for example, the identification of all cases assigned to a fiduciary. The 2001 report recommended:

- 11. The Superior Court in each county should implement a software program for management of probate cases. This system should include the ability to identify appointment of cases to fiduciaries and monitor critical reporting and court dates and should be modified, as necessary, to meet the needs of the Superior Court across the state.**

*Status: Implementation of this recommendation is in progress and is approximately 20% completed. The majority of the counties will utilize PAM or AZTEC software, other counties, for example, Maricopa County, have software in place to provide the information and data needed. Efforts are underway to assist the judges and court administrators in production of reports from these software programs to provide for oversight of fiduciaries.*

### IV. STANDARDIZATION

A major issue the FAC considered was the lack of standardization in policies, procedures and practice in the Superior Court across the state. The inconsistencies exist from the beginning of a probate case to its conclusion, resulting in confusion for fiduciaries, attorneys, judges, court staff and the public and the potential for "large holes" in the oversight of cases. The 2001 Report identified the publication by the State Bar of Arizona of the revised Arizona Probate Code Practice Manual ("Manual") and associated standardized forms. The Report also identified concerns regarding some individuals practicing without certification and the inability of the court to identify these individuals. The Superior Court in Pima County addressed this issue by requiring all initial filings in Probate Court be accompanied by an affidavit of verification, identifying if the fiduciary is certified and the relationship of the petitioner to the potential ward or client; therefore including cases where the petitioner is a family member. There were three recommendations regarding standardization in the 2001 Report:

- 12. The Supreme Court should require the statewide utilization of the Arizona Probate Code Practice Manual and its accompanying forms.**

*Status: This recommendation is being implemented and is approximately 20% completed. The Mental Health & Elder Law and Probate & Trust sections of the State Bar of Arizona have completed two conferences, with a third conference scheduled, to address standardization in probate practice. The Supreme Court has identified the need for a statewide committee to address the standardization of probate procedures; however, staff and budget shortages have prevented implementation of this committee to date.*

- 13. The Supreme Court should require the use of the Pima County Affidavit of Verification Form, as contained in the Arizona Probate Code Practice Manual, to accompany every initial filing of all petitions in the Probate Court statewide.**

*Status: The form is used in Pima County but statistics are not currently available to determine if other counties have adopted the process. Adopted changes to ACJA § 7-202 require a certified fiduciary use their certificate number on documents filed with the court. This requirement has been called to the attention of auditees in compliance audits and in training sessions.*

- 14. Judges should set the reporting dates for the inventory, first annual accounting and annual guardian report and estate management plan, if applicable, in the minute entry appointing the fiduciary to a case. Subsequent due dates should be set by minute entry on an annual and/or anniversary date. This provision should apply to both temporary and permanent appointments.**

*Status: This recommendation is part of the standardization process and the use of standardized forms and procedures.*

## **V. COURT-APPOINTED COUNSEL**

Arizona Revised Statutes § 14-5303(C) requires the Superior Court to appoint counsel, if an alleged incapacitated person is not otherwise represented by independent counsel, to represent the person at a court hearing for appointment of a guardian or conservator. The county assumes the associated cost in cases where there are insufficient funds in the person's estate. There are no uniform statewide guidelines regarding the selection, role and responsibilities of court-appointed counsel, and retention of counsel, resulting in significant differences in practice across the state. The two recommendations regarding court-appointed counsel were:

- 15. The Superior Court should develop a training program for court-appointed counsel. Inclusion of court-appointed investigators in this training would also be beneficial.**
- 16. Further discussion of this issue is warranted and should include examination of the merit of developing and adopting statewide guidelines for the appointment, qualifications and responsibilities of court-appointed counsel.**

*Status: A training workgroup of the Fiduciary Advisory Commission is currently addressing the issues of training for court appointed counselors and investigators, including statewide guidelines for court-appointed counsel and investigators.*

## **VI. AUDITS**

The 2001 report identified the lack of auditing controls to verify the accuracy and timeliness of information submitted by the fiduciary contributed to the inability of the courts to provide effective oversight. It provided two key recommendations to address this issue:

- 17. The Superior Court should explore programs which could be developed to utilize volunteers to monitor timely compliance with filing of required reports.**

*Status: Given the implementation of other recommendations, including, for example, the tracking software and the budget and staff shortages, the Fiduciary Advisory Commission recommends that a volunteer program is not a priority at this time.*

- 18. The presiding probate judge in each county should implement a procedure for random audits of conservatorship cases. The AOC would provide the personnel and funding to conduct the audits on the identified cases.**

*Status: The 2001 report recommendation was amended by the AJC and the Supreme Court to direct the AOC to develop a statewide random audit procedure and to include fiduciaries appointed as personal representative and guardian, in addition to conservator. Funding was acquired from the Case Processing Assistance Fund (CPAF) to hire an auditor. The auditor developed a compliance based audit process, specifically for court appointed fiduciaries, based on the industry standard of notification, fieldwork, exit interview, reporting and a corrective action plan. The audit focuses on fiduciary attributes consisting of statutes and the Arizona Code of Judicial Administration including the Code of Conduct.*

*To date, three audits of certified fiduciaries have been completed, including both public offices and fiduciaries in private practice, with two informal corrective action plans and one formal corrective action plan completed. Three additional audits are currently underway. The audits have determined both compliance and noncompliance by certified fiduciaries. Findings of noncompliance have included both statutory and ACJA mandates regarding failure to file an inventory and appraisal, inaccurate and untimely accountings, guardianship reports not being filed or filed without statutorily required information, conflicts of interest by the fiduciary, no settlement and distribution of decedent estates, violations of the prudent investor statute and lack of documentation.*



## VII. STATUTORY AMENDMENTS

The original FAC identified a number of statutes requiring changes with regard to recovery of bonds, actions for breach of fiduciary duties, enforcement of court orders and sharing of information among government agencies. The 2001 Report recommended statutory changes as detailed in the following six recommendations:

- 19. Review the statutes regarding the bonding process, surcharge actions, payment of attorney's fees, and treble damages.**

*Status: The Fiduciary Advisory Commission discussed this issue but has been unable to pursue it further. It is recommended this issue is not a priority at this time.*

- 20. Amend administrative rules and recommend to the Legislature amendments to applicable statutes to permit appropriate disclosure among government agencies of confidential information pertaining to investigations and other enforcement actions.**

*Status: The FAC assisted in the development of recommended changes to statute regarding disclosure and presented these changes to the AJC. The Auditor General's Office presented testimony to the AJC recommending these changes were not necessary and consequently it was decided not to pursue the statutory amendments.*

- 21. Recommend the Legislature adopt statutory amendments to authorize the court to issue criminal bench warrants for enforcement of court orders in probate matters and to specify that these warrants be entered into the statewide and national criminal history data banks.**

*Status: Changes to statute were proposed to the Legislature and adopted during the 2002 legislative session. The Fiduciary Arrest Warrant was used for the first time in Pima County in September 2002 and now provides an additional enforcement tool for judges. Further, the application forms completed by applicants for certification as a fiduciary now require the applicant to provide the information that would be necessary if a Fiduciary Arrest Warrant was issued.*

- 22. Recommend to the Legislature that the sentencing structure in the Arizona criminal code be amended to provide for enhanced sentences when a crime is committed against an incapacitated or vulnerable person.**

*Status: Enhanced sentencing changes to the criminal code were proposed and adopted by the Legislature during the 2002 legislative session.*

- 23. Recommend amendments to statutes to change reference to "private fiduciary" to "professional certified fiduciary."**

*Status: The 2002 statutory amendments approved by the Legislature, and subsequently also amended in ACJA § 7-202 and program materials now provide a consistent reference to all*

*fiduciaries as "certified fiduciaries." The term "professional certified fiduciary" was discussed, but not approved, by the AJC and its subcommittees and therefore, was not adopted.*

- 24. Recommend amendments to increase the statutory requirement for certification from the current level of an adult citizen to that of a citizen who is at least twenty-one years of age.**

*Status: This change was made to statute and ACJA § 7-202 through the 2002 legislative amendments.*

## **VII. STATEWIDE FIDUCIARY OFFICE**

Under current law, each county is required to have a public fiduciary office. The office primarily handles those cases where no one else is willing and able to serve the needs of incapacitated or protected persons. Funding is provided by the county board of supervisors. There are significant differences among the fifteen public fiduciary offices with respect to administration of cases and levels of funding. The 2001 report discussed the alternative model of a statewide public fiduciary office to administer all cases now handled by county public fiduciaries and private non-corporate fiduciaries and made the following recommendation:

- 25. The concept of a statewide fiduciary office should not be pursued.**

*Status: The AJC endorsed this recommendation and therefore, no further action was necessary.*

## **VIII. COMMISSION ON PROFESSIONAL FIDUCIARIES**

The efforts of the FAC highlighted the many and complex issues involved in the probate area and resulted in significant changes to the system. As a result, the 2001 Report recommended:

- 26. The Chief Justice establish a standing commission of the Arizona Judicial Council to serve in an advisory capacity on fiduciary matters to the Council and the Supreme Court. The Commission shall make recommendations to the Council and the Court to improve the quality, consistency and coordination of fiduciary and court procedures statewide to help ensure the ethics and standards of professional fiduciaries. It is recommended the Commission consist of seven members, with representation from public and private fiduciaries, the legal profession and the Superior Court.**

*Status: The standing Fiduciary Advisory Commission was established in 2002 and has been meeting regularly. Three working subgroups have been established within the Fiduciary Advisory Commission to address the issues of training, data collection and fees. The work of these subgroups include the issues the Commission now recommends the Court and the*

*Commission focus on in the coming months. These are presented below in the section titled "New Recommendations."*

## **NEW RECOMMENDATIONS**

### **I. TRAINING**

The 2001 Report identified the need for training programs for court-appointed counsel and investigators and the development of statewide guidelines for the appointment, qualifications and responsibilities of court-appointed counsel.

- 1. The Training Work Group should focus its efforts on implementation of training programs for court-appointed counsel and investigators and development of statewide guidelines for appointment, qualifications and responsibilities of court appointed counsel.**

### **II. DATA COLLECTION**

Data collection is critical to effective oversight of fiduciary cases. The Data Collection Work Group is currently considering the data elements that need to be collected to provide the court with meaningful information on Probate caseloads. It is also examining standardization of input into the databases, in light of the differing computer systems and operating procedures in use statewide. The Work Group will then focus on defining meaningful reports utilizing data elements currently existing within the computer systems and future data elements which may enhance current computer systems.

- 2. Develop a model data collection system for statewide use.**

### **III. FEES**

Superior Court judges are responsible for reviewing and approving fees charged by a fiduciary. The Fees Work Group is working with judges and court staff to prepare guidelines (as distinguished from a fee schedule) to set forth various factors for judges to consider when evaluating a fiduciary's fees. It is proposed the guidelines resemble the factors for determining reasonable attorneys' fees and costs.

- 3. Develop fee guidelines for Superior Court judges to consider when reviewing and approving fiduciary fees.**

#### **IV. CERTIFICATION EXAMINATION**

Although the certification examination was rewritten and revalidated in 2002, ongoing review of this new examination and changes to ACJA § 7-202 indicate the examination should be further revised to more accurately reflect the minimum standards of competency needed by a fiduciary.

- 4. Raise the standard for passing the examination to screen out those individuals who do not meet the minimum standards of the profession. Program staff should work with an appropriate test validator to further develop these standards and revise the examination.**

#### **V. PUBLIC INFORMATION**

Members of the public who file a complaint against a fiduciary are often confused regarding the role of the Superior Court and the Supreme Court, including the role of the fiduciary program staff. A brochure or similar public information would assist in clarifying the roles and the possible courses of action for the public. The information would set forth the role of the program and staff and the need for the complainant to seek independent legal counsel to pursue legal remedy against the fiduciary, including financial restitution and/or other changes to the court case itself.

- 5. Provide information to the public regarding the role and responsibilities of the Superior Court and the Fiduciary Program through development of a brochure and other public documents.**

## APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA

**In the Matter of:**

## ESTABLISHMENT OF THE FIDUCIARY ADVISORY COMMISSION AND APPOINTMENT OF MEMBERS

Administrative Order  
No. 2002 - 92

In accordance with Administrative Order 90-13, as revised on June 6, 1990, the Chief Justice may establish advisory committees to the Arizona Judicial Council to assist the Council in carrying out its responsibilities. The Fiduciary Advisory Committee, appointed by Chief Justice Thomas Zlaket in June 2000, made recommendations in its final report adopted by the Arizona Judicial Council, June 2001. Included in the adopted recommendations was the establishment of a standing commission to assist the Council regarding fiduciary activities.

Arizona Revised Statutes §14-5651 specifies the Arizona Supreme Court is responsible for overseeing the Fiduciary Program governing the certification and conduct of individuals and business entities that are eligible for court appointment as guardians, conservators and personal representatives.

Now, therefore, pursuant to Article VI, Section 3, of the Arizona Constitution and Arizona Revised Statutes §14-5651,

**IT IS ORDERED** that the Fiduciary Advisory Commission is established as follows:

1. PURPOSE:

The Commission shall examine issues of substance or procedure in the probate area and recommend changes to the system, including court rules and the Code of Judicial Administration, assist the Arizona Judicial Council in implementing the changes, evaluate the impact of the changes and recommend further changes if deemed necessary. The Commission shall make recommendations to improve the quality, consistency and coordination of fiduciary and court procedures statewide to help ensure the ethics and standards of professional fiduciaries are adequate for the protection of the state's vulnerable populations and the general public.

2. **MEMBERSHIP:**

The membership of the Commission is attached as an Appendix. The Chief Justice may appoint additional members as may be necessary.

3. **MEETINGS:**

Meetings shall be scheduled at the discretion of the Commission Chair. All meetings shall comply with the Open Meeting Policy of the Arizona Judicial Department.

a. **REPORTS:**

The Commission shall submit at a minimum, an annual report of its evaluations or recommendations to the Arizona Judicial Council by June 30 of each year.

b. **STAFF:**

The Administrative Office of the Courts shall provide staff for the Commission and, as feasible, may conduct or coordinate research as requested by the Commission.

Dated this 26<sup>th</sup> day of August, 2002.

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CHARLES E. JONES  
Chief Justice

**APPENDIX B**  
**Fiduciary Advisory Commission**  
**Current Membership**

**Mr. Marcus Reinkensmeyer, Chairperson**  
(Term expires: 2005)

**Ms. Patricia Ian**  
(Term expires: 2003)

**Mr. John H. Barron, III**  
(Term expires: 2005)

**Ms. Cindy Linnertz**  
(Term expires: 2003)

**Ms. Mary Espinoza**  
(Term expires: 2005)

**Honorable Barbara Mundell**  
(Term expires: 2004)

**Ms. Alisa J. Gray**  
(Term expires: 2004)

**Mr. Gary Noviello**  
(Term expires: 2004)

**Ms. Francine Saccio**  
(Term expires: 2004)

**Mr. Andrew J. Seplow**  
(Term expires: 2003)

**(Vacant Seat)**